had never been "issued" and upheld the transaction on that ground. The same is true of *Cattlemen's Trust Co.* v. *Pruett* (Tex. 1916), 184 S. W. 716. In the *McCarty* case, which seems to be the leading Texas case on the subject, cases in three states are cited to support the court's construction of the statute. But it is submitted that none of these cases supports the proposition for which they are cited. Thus *Jefferson* v. *Hewitt,* 103 Cal. 624, 37 Pac. 638, decides that a note payable upon condition does not satisfy the statute, while later California cases (see *Quartz Glass & Mfg. Co.* v. *Joyce,* supra) are clearly opposed to the Texas construction. The Pennsylvania cases, *Leighty* v. *Turnpike Co.,* 14 Serg. & R. 434, and *Boyd* v. *Peach Bottom Ry. Co.,* 90 Pa. St. 169, are both under statutes requiring a minimum cash payment on each share of stock issued. The opinion in *Williams* v. *Brewster,* 117 Wis. 370, is cited at some length by the Texas court, and superficially would seem to support its position, but the case itself merely decides that stock issued for a note not yet due is not "paid in."

CRIMINAL LAW—VARIANCE IN CHARGE OF ASSAULT AND BATTERY.—Under an indictment charging defendant, a convict-guard, with assault and battery with a club, the proof showed that the assault was committed with a strap. *Held,* that, as the defendant was not misled as to the subject of prosecution, this was not a fatal variance. *State* v. *Mincher* (N. C. 1916), 90 S. E. 429.

An indictment for assault and battery which charges that accused made the assault on a named person and did unlawfully beat him, is sufficiently specific, though it does not allege what acts constituted the assault, nor in what manner the beating was done. *Sims* v. *State,* 118 Ga. 761, 45 S. E. 621; *State* v. *Clayton,* 100 Mo. 516, 13 S. W. 819, 18 Am. St. Rep. 565; *State* v. *Finley,* 6 Kan. 366. Conceding that such allegation of the means used is unnecessary, what is the effect of so alleging that fact? Is it mere surplusage which does not vitiate the indictment otherwise sufficient, and as such need not be proved, or is it a part of a material allegation of that descriptive nature which requires exact proof? The general rule is stated thus,—"When a material allegation is made unnecessarily precise by a too particular description, the descriptive averment cannot be separated and rejected but must be proven as laid. Whether an unnecessary allegation may be rejected as surplusage, or must be proved as laid, is not always easy to determine. The reason for insisting on proof of the description is that otherwise the defendant would be misled to his harm; though the same reason would in many cases require proof of the allegations rejected under the rule of surplusage." BEALE, CRIMINAL PLEADING AND PRACTICE, § 112. Whether the doctrine of notice be the real foundation for requiring proof of the facts alleged, or not, courts have not been agreed in their application of the rule. In accordance with the above rule, it has been held that where the state elected to try the accused for an assault committed on a particular date in a particular manner, it must prove that the assault was committed on that date by the means alleged. *Graham* v. *State,* 72 Tex. Crim. App. 9, 160 S. W. 714. Also, under an indictment charging assault with a knife, such

means of assault must be proved. *Hext* v. *State,* 48 Tex. Crim. 576, 90 S. W. 43; *Wilson* v. *State,* 7 Ala. App. 66, 60 So. 983. Similarly, mere descriptive epithets cannot be rejected as surplusage, ever if they are introduced by a videlicet. *Walker* v. *State,* 73 Ala. 17; *Commonwealth* v. *McCarthy,* 145 Mass. 575, 14 N. E. 643. In *Walker* v. *State,* under an indictment for assault "with a weapon, to-wit, a gun," proof of assault with the hand or first only, shows a fatal variance. Likewise, in *Commonwealth* v. *McCarthy,* an allegation in an indictment that the defendant "wilfully did throw a certain missile, to-wit, a stone" was not sustained by proof that he threw only a billet of wood. Variances were held to be fatal in the following cases,—allegation of assault with axe, proof of assault with shovel, *Ferguson* v. *State,* 4 Tex. App. 156; allegation of assault with bois d'arc stick, proof of assault with picket, *McGrew* v. *State,* 19 Tex. App. 302; allegation of assault with knife, proof of assault with stick, *Herald* v. *State,* 37 Tex. Crim. 409, 35 S. W. 670; allegation of assault with bottle, proof of assault with glass, *Jones* v. *State* (Tex. Crim. App. 1901), 62 S. W. 758. On the other hand, under an indictment charging assault "with a deadly weapon, to-wit, a club," it was held that proof of the injuries received, without specification of the means used, sustained the indictment. *State* v. *Phillips,* 104 N. C. 786, 10 S. E. 463. And variances were held not to be fatal in the following cases, viz: allegation of assault with razor, proof of assault with pocket-knife, *Hall* v. *State,* 79 Ala. 34; allegation of assault with fist, proof of assault with hand, *Allen* v. *State,* 36 Tex. Crim. App. 436, 37 S. W. 738; allegation of striking with gun, proof of beating with stone, *Ryan* v. *State,* 52 Ind. 167. With the possible exception of the case last cited, the principal case goes further than any preceding case in holding that the variance is not fatal. In applying the doctrine of notice to the facts under consideration, the North Carolina court undoubtedly arrived at a commendable decision. A variance should not be fatal unless it appears to have resulted in unfair surprise. If, by reason of the descriptive allegations, the defendant had prepared to try one transaction, and the state then sought to try another, that would be such a case. If, on the other hand, the defendant has prepared to try the very transaction evidenced by the state, the fact that the defendant may have hoped to succeed by disproof of an immaterial allegation, should be considered irrelevant.

DAMAGES—EXEMPLARY DAMAGES AGAINST CORPORATION FOR TORT OF SERVANT.—In an action for damages for an assault and battery committed on the plaintiff by the servants and employees of the defendant corporation, *Held,* exemplary damages may be allowed against the corporation. *Indianapolis Bleaching Co.* v. *McMillan,* (Ind. App. 1916), 113 N. E. 1019.

The two propositions involved in this case, (1) as to whether exemplary damages may be recovered for an act that may be punishable as a crime, and (2) as to whether a corporation can be held liable in exemplary damages for the act of its servant, are questions about which there is great contrariety and confusion in the authorities. In the principal case the rule is laid down that examplary damages cannot be assessed in case of a wrong